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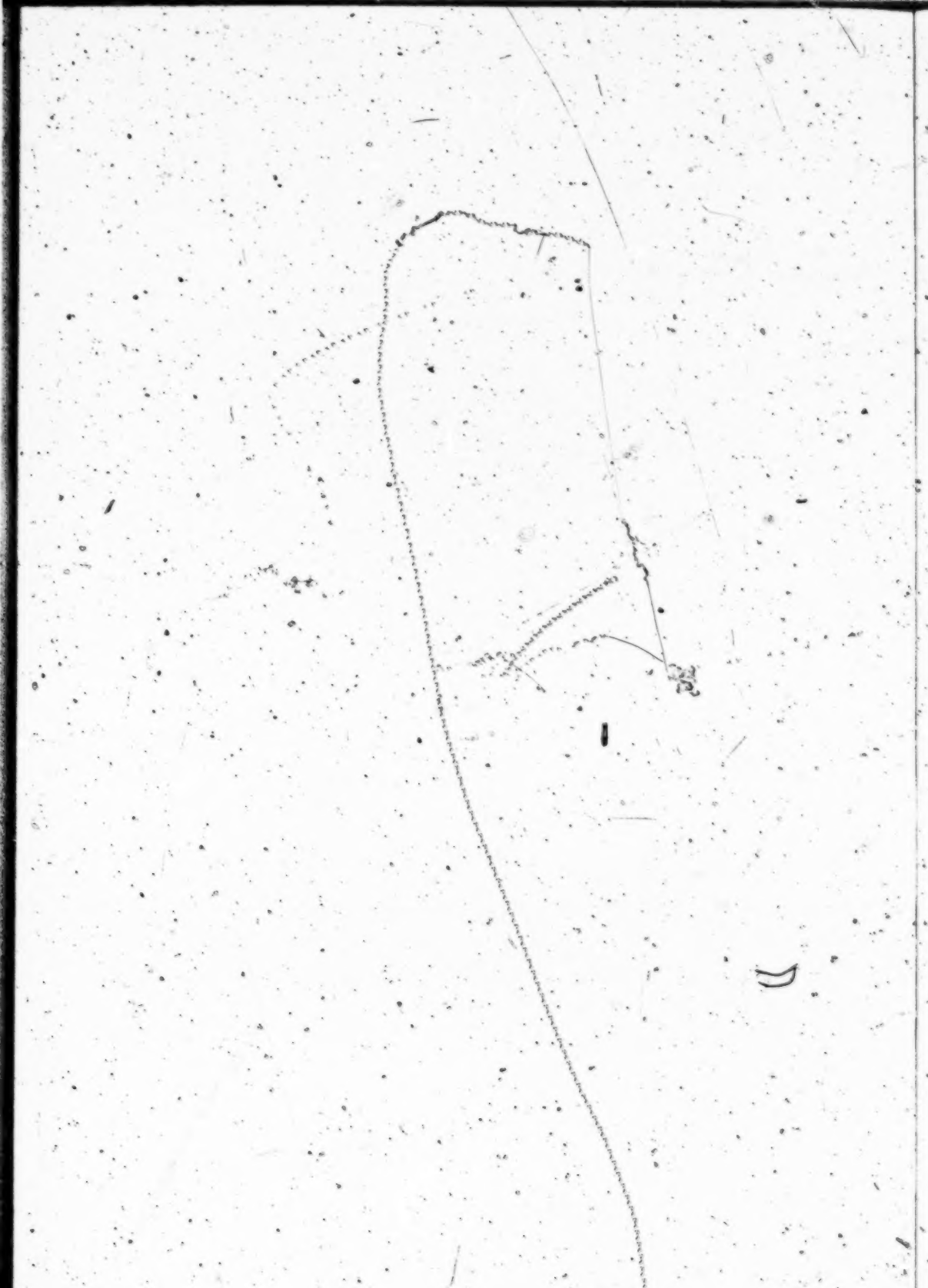
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Supreme Court of the United States.

OCTOBER TERM, 1967.

No.

SCHOOL COMMITTEE OF THE CITY OF BOSTON,
Appellant,
v.
BOARD OF EDUCATION ET AL.,
Appellees.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the Supreme Judicial Court of the Commonwealth of Massachusetts entered June 9, 1967, and from a final decree after rescript of the Superior Court of the Commonwealth of Massachusetts entered pursuant thereto as of June 12, 1967. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal constitutional questions are presented.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at 1967 Mass. Adv. Sh. 1027. It is set forth at pages 19-27 of the Appendix.

Jurisdiction.

The proceeding that gives rise to this appeal was brought pursuant to chapter 231A of the General Laws of Massachusetts, the Declaratory Judgments Statute. Invoking

this statute the School Committee of the City of Boston (hereinafter called the Committee) filed a bill for declaratory relief against the State Board of Education (hereinafter called the Board) and the Commissioner of Education seeking a declaratory judgment that Massachusetts St. 1965, c. 641 (the so-called Racial Imbalance Act) was repugnant to the Due Process and Equal Protection Clauses of section 1 of the Fourteenth Amendment (R. I, 1-5).[1] The case was reserved and reported without decision by a judge of the Superior Court upon the pleadings, evidence and findings of fact, such decree to be entered as justice and equity may require (R. I, 1). The Supreme Judicial Court ordered entry of a final decree declaring that the Racial Imbalance Act was not in violation of the Fourteenth Amendment of the Constitution of the United States. This order was incorporated in its rescript entered on June 9, 1967, and notice of appeal was filed on September 1, 1967.

The appeal is taken from this order of the Supreme Judicial Court and from the final decree after rescript entered thereon by the Superior Court as of June 12, 1967.[2]

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[1] The present case was tried concurrently with a petition by the Committee under St. 1965, c. 641, § 2 (inserting § 1J in G.L. c. 15) for judicial review of the Board's disapproval of a plan submitted by the Committee and the Board's recommendations to the Committee. The trial court in its findings of fact in the present case incorporated into the record of this case its "Findings, Rulings and Order for Decree" in the companion case for judicial review. References to the typewritten record in the judicial-review case will bear the prefix R. II. References to the printed record in the present case will bear the prefix R. I (R. I, 19). The judicial-review case became moot when the Board subsequently approved a new plan submitted by the Committee and waived its appeal (Suppl. Record on Appeal).

[2] Under the Massachusetts statutes (G.L. (Ter. Ed.) c. 211, § 8, and c. 231, § 135) and practice only questions of law are brought

The statutory provision believed to confer jurisdiction of the appeal upon this Court is 28 U.S.C. § 1257 (2).

The cases believed to sustain the jurisdiction of this Court are *Poulos* v. *New Hampshire,* 345 U.S. 395, and *McLaughlin* v. *Florida,* 379 U.S. 184.

Statute Involved.

The Massachusetts Statute involved is St. 1965, c. 641, the so-called Racial Imbalance Act, and it is printed in the Appendix at pages 28 to 32.[1]

Questions Presented.

The basic question on appeal is:

> Whether Massachusetts St. 1965, c. 641, the Racial Imbalance Act, on its face and as applied to the School Committee of the City of Boston is repugnant to the Due Process and Equal Protection Clauses of section 1 of the Fourteenth Amendment to the United States Constitution, or involves any other denial of Federal right, whether or not capable in itself of being brought here by appeal.

---

before the Supreme Judicial Court, the record remaining in the Superior Court. Although the order of the Supreme Judicial Court is final for purposes of appeal to this Court (*Cole* v. *Violette,* 319 U.S. 581), it is the Massachusetts practice to enter a further final decree upon the rescript of the Supreme Judicial Court, and, to avoid any question, this appeal is taken from both.

[1] This statute inserted sections 37C and 37D in Massachusetts General Laws, c. 71, and sections 1I, 1J and 1K in Massachusetts General Laws, c. 15. The statute contains no severability provision.

Within the foregoing basic question there are comprised, among others, the following subsidiary questions:

(*a*) Whether the law is unconstitutional for vagueness under the Fourteenth Amendment because it is harnessed to a distinction between non-whites and whites without any legislative criteria to determine the meaning of these terms;

(*b*) Whether the law, regardless of its purpose, is unconstitutional under the Fourteenth Amendment because it is based upon a color or racial classification;

(*c*) Whether the law is unconstitutional under the Fourteenth Amendment because it establishes a discriminatory quota for nonwhites based on color for attendance at every elementary and secondary public school in the Commonwealth of Massachusetts;

(*d*) Whether the law is unconstitutional under the Fourteenth Amendment because it discriminates unfairly against similarly situated underprivileged white groups;

(*e*) Whether the law is unconstitutional under the Fourteenth Amendment because full implementation of the law in the City of Boston will require the allocation of students to public schools based solely on color.

Statement of the Case.

The Committee instituted a bill in equity for declaratory relief under Massachusetts General Laws, c. 231A, in the Superior Court against the Board and the Commissioner of Education alleging that the Racial Imbalance Act violated the Fourteenth Amendment to the Constitution of

the United States and seeking an adjudication to that effect (R. I, 1-5). The Board and the Commissioner of Education in their answer requested a declaration by the Court that this Act did not violate any provision of the United States Constitution (R. I, 8).

The constitutional questions were presented again to the trial court throughout the entire course of the trial (R. I, 12, 13, 14, 15, 19). The case was reserved and reported without decision by the trial judge upon the pleadings, evidence and findings of fact, such decree to be entered as justice and equity may require (R. I, 1).

The Supreme Judicial Court dealt with the constitutional issues presented, decided that the Racial Imbalance Act did not violate the Fourteenth Amendment of the Constitution of the United States and ordered entry of a final decree to that effect (App. p. 18).

The Racial Imbalance Act may be briefly summarized as follows: It provides that the School Committee of each community shall annually take a racial census (white or nonwhite) in each school subject to its jurisdiction. This census is forwarded to the Board, which then determines whether imbalance as defined in the Act exists. The generic statutory definition of racial imbalance states that such imbalance "refers to a ratio between nonwhite and other students in public schools which is sharply out of balance with the racial composition of the society in which nonwhite children study, serve and work" § 37D. The Act further provides that "racial imbalance shall be deemed to exist when the percent of nonwhite students in any public school is in excess of fifty per cent of the total number of students in such school" § 37D. If the Board finds that racial imbalance exists in a public school, it shall notify the appropriate School Committee, which must prepare a plan to eliminate imbalance. The plan must detail

changes in existing school-attendance districts, location of proposed school sites, proposed additions to existing school buildings "and other methods for the elimination of racial imbalance." If the Board is not satisfied that a given School Committee is making reasonable progress toward the elimination of racial imbalance within the public schools under its jurisdiction, the Commissioner of Education may order state-aid funds withheld from the city or town in question and approval of school construction projects shall be denied.

In the present case the required racial census was prepared by the Committee sometime in October, 1965 (R. I, 17; Ex. 4A, p. 5). This census disclosed that 25% of public elementary-school students attended thirty-eight racially imbalanced schools, defined as having enrollment over 50% nonwhite (Ex. 1, p. 5). This represented 10,920 children, of whom 1,150 were white and 9,770 were nonwhite (Ex. 1, p. 5). On the basis of these statistics the Board notified the Committee that racial imbalance existed in certain schools, and the Committee was required to and did file with the Board in 1965 a plan to eliminate racial imbalance (R. I, 17). This and other subsequent plans submitted by the Committee were disapproved by the Board (R. I, 17-19),[1] and this action by the Board resulted in the present litigation instituted on September 23, 1966 (R. I, 1-5).

The percentage of nonwhites attending the Boston public schools is increasing. In a two-year period, 1964-1966,

[1] The Committee's plan of June 13, 1966 (Ex. 2), which was rejected by the Board, was found by the trial judge to be "well prepared" (R. II, 6). When the same plan was resubmitted by the Committee on July 7, 1966, it was again rejected by the Board (R. I, 19; R. II, 9). The trial judge also found that the Committee had valid and substantial objections to the Board's recommendations for modification of this plan (R. I, 19; R. II, 14).

the nonwhite student population increased by 3,871 while the white student population decreased by 3,324 students (R. I, 16). City-wide 25% of the school population is nonwhite (R. I, 16).[1]

The Boston School System operates on the so-called neighborhood plan (Ex. 2, p. 36), and the racial composition of the school reflects the racial composition of the neighborhood from which it draws (Ex. 1, p. 2). The City of Boston also has an open-enrollment plan which provides that any student may attend any school the parent wishes in any part of the City provided there is an available seat and appropriate courses for the child, and the parents bear the transportation costs. Compensatory enrichment programs are currently operating in thirty-eight schools at the elementary level to assist disadvantaged children (R. I, 16, 17). There was uncontradicted testimony that many children, if compelled to go to a school other than their neighborhood school, would lose the benefit of such compensatory programs (Tr. 138, 139).

There was uncontradicted testimony that, in order to fully comply with the Racial Imbalance Law in the City of Boston, there would have to be a massive exchange of students between balanced and imbalanced schools based solely on color (Tr. 33, 34, 35, 159, 161, 257; Ex. 1, p. 3). Other methods, such as redistricting, will not eliminate imbalance (Tr. 148; Ex. 1, pp. 3, 5). Even before the passage of the Racial Imbalance Act the Committee had tried to reduce imbalance by grade reorganization (Tr. 70).

The Board has repeatedly insisted on total compliance with the Act (Ex. 3, p. 1; Tr. 164, 205, 277, 282). Once a

[1] The Attorney General's brief to the Supreme Judicial Court stated (at page 15): "It is well known that the population of Boston is less than 12% Negro and the proportion of Negroes in Boston public schools is only 25%."

school has been balanced by reducing its percentage of nonwhites to below 50%, the Board requires that the Committee's plan must give assurances for the future that the quota will not be exceeded (Ex. 1, p. 3; Ex. 3, p. 8).

On March 15, 1967, after the trial of this suit in the Superior Court, the Board approved a new plan prepared by the Committee pursuant to the following vote: "With the expectation that the Boston School Committee will utilize significantly more of our previously stated recommendations for short term methods for the elimination of racial imbalance in the school year 1967-1968, the plan of the Boston School Committee for 1966-1967 is approved as a first step" (Suppl. Record, Ex. A). The Board's letter of acceptance to the Committee requested that development of the second-stage plan begin immediately (Suppl. Record, Ex. A). Upon this approval state funds previously withheld were released and paid to the City of Boston (Suppl. Record).

The Questions are Substantial.

The questions presented by this case are of pressing public importance from a constitutional, social and economic standpoint. The problems of racially imbalanced public schools and of the constitutionally appropriate legislative method of coping with such imbalance are not peculiar to Massachusetts, but are common to many northern states.[1] The Racial Imbalance Act presents novel and important questions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United

[1] Illinois and Indiana have enacted less stringent legislation to deal with the problem of racial imbalance. See Ill. Rev. Stat. 1965, c. 122, § 10-21.3; Burns Ind. Stat. Ann. Tit. 28, § 28-5157 (Cum. Sup. 1967).

States Constitution. Unlike the Massachusetts Court, the Illinois Supreme Court has recently held its law to eliminate racial imbalance unconstitutional on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment. *Tometz* v. *Board of Education, Waukegan City School District No. 61,* N.E. 2d .[1] The Massachusetts law may not only set the pattern for similar state legislation elsewhere, but may also supply a premise for other legislative efforts to achieve racial harmony by establishing racial or color quotas in state colleges, housing and employment, both public and private. The payment of millions of dollars of public moneys to cities and towns in Massachusetts for educational purposes and the disbursement of such funds are contingent upon the constitutional validity of the Racial Imbalance Act and its mode of implementation. This is not an academic controversy. The members of the Committee are being called upon to comply fully with the Act, and, insofar as they have general charge of all Boston's public schools, they may properly use the declaratory-judgment procedure as a vehicle for obtaining (1) a declaration as to their rights and duties in administering the School System under the Act and (2) a determination of the constitutionality of the Act both on its face and in its application to the City of Boston. *Commissioner of Administration* v. *Kelley,* 350 Mass. 501, 215 N.E. 2d 653. We stress that, if the Committee proceeds to take action based on color which turns out to be constitutionally prohibited, the members will be civilly

[1] The Court also held that the law violated section 22 of article IV of the State Constitution.

According to the Clerk of the Illinois Supreme Court the opinion of the Court, although filed on June 22, 1967, is not yet reported because a petition for rehearing has been allowed by the Court and the case again taken under advisement.

liable to an aggrieved person under the Civil Rights Acts, 42 U.S.C. §§ 1981, 1983, and subjected to criminal penalties under 18 U.S.C. § 242.

1. The Act violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because of its vagueness. It is premised upon a classification which distinguishes between whites and nonwhites, but no criteria are furnished administrative officials to aid in the distinguishing of students. Such uncertainty has been held constitutionally objectionable. *Tometz* v. *Board of Education, Waukegan City School District, No. 61,* N.E. 2d

The Supreme Judicial Court regarded as decisive *School Committee of New Bedford* v. *Commissioner of Education,* 349 Mass. 410, 208 N.E. 2d 814, holding that such a classification was a sufficient standard for use in preparing a school racial census. However, that decision was limited to a racial census merely intended to supply information.[1] Here we are concerned with a law which sanctions governmental action against an individual and will result in his exclusion from or allocation to a particular school because of his color classification.

2. Since the Act utilizes color or race as a criterion of state legislative action, it results in a violation of the Equal Protection Clause of the Fourteenth Amendment. Any legislative peacetime color classification which compels or restricts the movement of human beings because of their color or which establishes a color quota is constitutionally objectionable, no matter how apparently worthy the objective. It is apparent that an objective which may be regarded as benign by one individual or group may with equal or greater

[1] Moreover, the Supreme Judicial Court expressly stated on page 1030 of its opinion in the present case that in the *New Bedford* case "there was no contention of unconstitutionality."

propriety be regarded as malign by another individual or group.

If our constitutional doctrine were otherwise, the cultural and social identity of nonconforming minority groups could be eliminated with relative ease by a legislature. We submit that the inherently discriminatory effect of the allocation of students to public schools because of their color (or race or religion) or of a quota based on color (or race or religion) is *per se* arbitrary, and accordingly a denial of equal protection.

It is implicit in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, that color or race is a constitutionally impermissible standard for the assignment of school children to public schools. We construe *Brown* as endorsing Mr. Justice Harlan's classical statement in *Plessy* v. *Ferguson*, 163 U.S. 537, 559: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."

This is the view expressed by the Illinois Supreme Court in *Tometz* v. *Board of Education, Waukegan City School District No. 61* N.E. 2d , where the Illinois law to eliminate racial imbalance in the public schools was held unconstitutional in a majority opinion.

3. Assuming *arguendo* that the Racial Imbalance Act is not *per se* constitutionally offensive, it is submitted that the Supreme Judicial Court incorrectly rejected the test of constitutionality of state legislation incorporating a racial classification laid down by this Court in *McLaughlin* v. *Florida*, 379 U.S. 184, and confirmed in *Loving* v. *Virginia*, 388 U.S. 1.

McLaughlin demonstrates that, when a racial classification is employed in social legislation, the State has a very heavy burden of justification. The State must establish by substantial and convincing evidence that its action is consistent with the equal protection clause, and must do

so by proving that there is some "overriding statutory purpose" requiring the racial classification and that the classification is "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U.S. 184, 192, 196.

In this case the Committee admits that the statutory objective of equal educational opportunity is one appropriate for legislative remedy. However, the racial classification embodied in the Racial Imbalance Act is a constitutionally objectionable method of attaining a legitimate objective, because it sanctions and results in unreasonable and invidious official discrimination not shown by the State to be essential to the accomplishment of permissible State policy.

4. Since the Act sets an inflexible maximum percentage enrollment of 50% for nonwhite pupils in the elementary and secondary public schools, a discriminatory color quota is established for nonwhites for attendance at every such school.[1] Paradoxically, the purported beneficiaries of remedial legislation are subjected by the law to the impact of an exclusionary color quota; there is no parallel exclusionary quota for whites. In this context we are faced with a law which on its face as a matter of principle affirmatively sanctions and requires the official exclusion of a child from a public school because of his color.[2] Thus nonwhite

[1] Under the generic definition of racial imbalance contained in the Act, this quota may be substantially less than 50%. Assuming the racial composition of the Boston community to be 12% Negro (see page 7, fn. 1), then a school having a Negro enrollment in excess of 25% would appear to be imbalanced. According to the 1966 census the nonwhite student population of the Brighton High School, the Trade High School and the Trade High School for Girls is in excess of 30% (Ex. 4C, p. 3).

[2] We assume that the Racial Imbalance Law by implication repeals or amends Mass. G.L. c. 76, § 5 (applicable to cities under chapter 4, § 7, Thirty-fourth), which prohibits the exclusion of any child from a public school because of his race, color or religion.

students, otherwise qualified, may solely, because of their color, be excluded not merely from their neighborhood school, but also from such better public city-wide High Schools as Trade, Technical, or Brighton, if their admission would result in a racially imbalanced school.

The psychological wound produced on an individual by the mere existence or impact of a color quota is in essence no different from the humiliation and stigma inflicted by school segregation which was condemned by this Court in *Brown* v. *Board of Education of Topeka,* 347 U.S. 483.

There is nothing to indicate that a racial or color quota is essential to the achievement of a permissible educational objective. Such a quota in its conception is the very kind of odious discrimination obnoxious to the Equal Protection Clause, and it is of no consequence that it is generated by a law which purports to be the product of a benevolent paternalism having a purely benign objective. An individual who can be excluded from a particular school because of a color quota may well view with justifiable skepticism a claim that this is a benign quota designed for his protection. A law which embodies the discriminatory concept of a color quota should be condemned now as constitutionally offensive, whether or not a child has yet in fact been excluded from a public school pursuant thereto, particularly where the Committee has been required by the Board to give assurance that the quota will be perpetuated (Ex. 1, p. 3; Ex. 3, p. 8).

The Court's attention is invited to a number of decisions wherein governmental efforts to create or enforce purportedly benign racial quotas in housing, employment, juries and electoral districts have been held constitutionally invalid. *Cassell* v. *Texas,* 339 U.S. 282, 286-287. *Collins* v. *Walker,* 329 F. 2d 100. *Wright* v. *Rockefeller,* 211 F. Supp. 460, 468, 471 (Feinberg, J., concurring, and Murphy,

J., dissenting); aff'd 376 U.S. 52, 59. *Progress Development Corp.* v. *Mitchell,* 182 F. Supp. 681; rev'd in part and aff'd in part 286 F. 2d 222. *Banks* v. *Housing Authority of City and County of San Francisco,* 120 Cal. App. 2d 1, 260 P. 2d 668; cert. den. 347 U.S. 974. *Taylor* v. *Leonard,* 30 N.J. Super. 116, 103 A. 2d 632.

5. The Act is discriminatory because it is unreasonably preferential and unequal in its application to the underprivileged groups in our society whose educational patterns are similarly abnormal, *Tometz* v. *Board of Education, Waukegan City School District,* N.E. 2d . If there is an evil to be corrected which results from the over-concentration of minority groups in the classroom and from their lack of access to the dominant white, middle-class culture, it is not confined to an amorphous group identified as nonwhite, but extends to other minority groups as well.

Excluded from the purported legislative bounty are such similarly situated groups as Puerto Ricans, whose plight is probably not significantly different from that of the Negro or nonwhite in Massachusetts.[1]

And, on the other hand, since Asiatics are presumably nonwhite (Note, 46 B.U. L. Rev. 45, 69-70), the Act paradoxically and unreasonably extends its purported legislative bounty to the Chinese community in Boston, a group not shown by either history, culture or academic or social performance to be uniquely in need of such legislative aid.[2]

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[1] Although Puerto Ricans possess a certain homogeneity, racially they are very divergent. Probably, at least a significant percentage of the group will be classified as white, since they are essentially Caucasians. Bittker, "The Case of the Checker-Board Ordinance; An Experiment in Race Relations," 71 Yale L.J. 1387, 1414-1415. *Cf. Wright* v. *Rockefeller,* 211 F. Supp. 460, 465; *Barksdale* v. *Springfield School Committee,* 237 F. Supp. 543; vacated and remanded 348 F. 2d 261.

[2] According to the 1965 and 1966 censuses (Ex. 4B, p. 4; Ex. 4(c), p. 2) there are 671 Chinese in the Boston School System.

6. The law requires and the Board has consistently demanded that the Committee prepare a plan or series of plans to achieve total ultimate compliance. The uncontradicted evidence shows that such full ultimate compliance in the case of the City of Boston can be accomplished only by an exchange of students between balanced and imbalanced schools based solely on color.[1] Similarly situated students will be treated differently only because of their color.

Such a selection process has been held or stated to be a violation of the Equal Protection Clause. *Bell* v. *School City of Gary, Indiana,* 213 F. Supp. 819, 831; aff'd 324 F. 2d 209. *Stell* v. *Savannah-Chatham County Board of Education,* 255 F. Supp. 83, 88. *Olson* v. *Board of Education of Union Free School District No. 12, Malverne, New York,* 250 F. Supp. 1000, 1010.

Cases sanctioning administrative procedures for eliminating racial imbalance such as *Wanner* v. *County School Board of Arlington County, Virginia,* 357 F. 2d 452, and *Morean* v. *Board of Education of Montclair,* 42 N.J. 237, 200 A. 2d 97, are quite distinguishable in this respect, since in those cases all students within the particular attendance district were affected equally by the School Board's administrative action in closing a particular school or redrawing attendance lines.

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[1] Although the Racial Imbalance Act forbids compulsory transportation of a pupil outside his neighborhood school district, if his parent files a written objection, the Act does not prohibit compulsory assignment to a school other than a neighborhood school.

Conclusion.

This appeal poses, in a case of first impression, pressing questions as to appropriate legislative methods of dealing with the problem of racial imbalance in the public-school systems of this country. The resolution of the issues growing out of the enactment of the Massachusetts Racial Imbalance Law will do much to clarify an important and controversial area of constitutional law.

Respectfully submitted,

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RECORD APPENDIX.

1. Rescript of Supreme Judicial Court.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, June 9, 1967.

In the case of

SCHOOL COMMITTEE OF BOSTON

vs.

BOARD OF EDUCATION & Another

pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

The interlocutory decree is affirmed. A final decree is to enter declaring that the racial imbalance act, St. 1965, c. 641, is not in violation of the Fourteenth Amendment of the Constitution of the United States or of arts. 1, 10, 11, 12, and 30 of the Declaration of Rights of the Constitution of the Commonwealth.

By the Court,
RICHARD A. McLAUGHLIN,
Clerk.

June 9, 1967
A true copy.
Attest:

RICHARD A. McLAUGHLIN
Richard A. McLaughlin, Clerk of the
Supreme Judicial Court for
the Commonwealth

September 1, 1967.

2. Final Decree after Rescript.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT

No. 86080 Eq.

THOMAS S. EISENSTADT, *et als*

vs.

THE (STATE) BOARD OF EDUCATION, *et al*

FINAL DECREE AFTER RESCRIPT

Pursuant to a Rescript of the Supreme Judicial Court for the Commonwealth of Massachusetts it is hereby decreed that the Racial Imbalance Act, St. 1965, c. 641 is not in violation of the Fourteenth Amendment of the Constitution of the United States or of Articles 1, 10, 11, 12 and 30 of the Declaration of Rights of the Constitution of the Commonwealth.

By the Court, (Macaulay, J.)

Sept. 22, 1967 FRANCIS B. TYRRELL

Assistant Clerk

Entered as of June 12, 1967

A true copy

Attest:—

THOMAS DORGAN

Clerk.

3. Opinion of the Supreme Judicial Court.

SCHOOL COMMITTEE OF BOSTON *vs.* BOARD OF EDUCATION & another.

Suffolk. May 4, 1967.—June 9, 1967.

Present: WILKINS, C.J., SPALDING, KIRK, SPIEGEL, & REARDON, J.J.

Education. School and School Committee. Racial Imbalance Law. Constitutional Law, Due process of law, Equal protection of laws, Legislative finding, Presumption of constitutionality, Racial imbalance. *Equity Jurisdiction,* Declaratory relief. *Words,* "Racial imbalance."

Report by *Macaulay,* J., of a suit in equity in the Superior Court.

WILKINS, C.J. This bill for declaratory relief under G. L. c. 231A is brought to settle a controversy between the plaintiff school committee and the defendants Board of Education and Commissioner of Education, G. L. c. 15, §§ 1E, 1F (as amended through St. 1966, c. 251, § 1, and St. 1966, c. 549, respectively), as to the constitutionality of St. 1965, c. 641, entitled "An Act providing for the elimination of racial imbalance in the public schools," which inserted §§ 37C and 37D in G. L. c. 71, and §§ 1I, 1J, and 1K in G. L. c. 15. The case is reserved and reported without decision by a judge of the Superior Court upon the pleadings, evidence, and findings of fact,[1] such decree to be entered as justice and equity may require. G. L. c. 214, § 31.

[1] The case was tried with a petition by the school committee under G. L. c. 15, § 1J, for judicial review of (1) the board's disapproval of a plan submitted by the committee and (2) the board's recommendations to the committee. The trial judge's findings were unfavorable to the board, to which he remanded the matter. The board appealed, but the case became moot when the board approved a new plan submitted by the committee, and waived its appeal. The findings in the case for judicial review are incorporated by reference in the report in the case at bar. A demurrer to the bill by the defendants was overruled by an interlocutory decree. This ruling is not expressly reported, and is not argued by the defendants. In any event, as we are deciding the merits, we affirm that decree. See *Travers* v. *Grossman,* Mass. (Mass. Adv. Sh. [1967] 431, 433-434).

The racial imbalance act requires the school committee of every municipality annually to submit statistics showing the percentage of nonwhite pupils in all public schools and in each school. Whenever the board finds that racial imbalance exists in a public school, it shall give written notice to the appropriate school committee, which shall prepare a plan to eliminate imbalance and file a copy with the board. "The term 'racial imbalance' refers to a ratio between nonwhite and other students in public schools which is sharply out of balance with the racial composition of the society in which nonwhite children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of nonwhite students in any public school is in excess of fifty per cent of the total number of students in such school." The plan must "detail the changes in existing school attendance districts, the location of proposed school sites, the proposed additions to existing school buildings, and other methods for the elimination of racial imbalance." The plan must consider the safety of the children and may provide for voluntary coöperation with other cities and towns. No committee as part of its plan may be required to transport any pupil outside his school district if the pupil's parent or guardian objects in writing. (G. L. c. 71, § 37D.)

The board shall provide technical and other assistance in the formulation and execution of plans. If a committee does not show progress within a reasonable time in eliminating imbalance, the commissioner may order State aid funds withheld until an acceptable plan has been received. (G. L. c. 15, § 1I).

If a committee declines to accept recommendations submitted by the board, or the board disapproves a revised plan, the committee may seek judicial review. The court may affirm the determination of the board and order com-

pliance, or it may find that the determination of the board is in excess of its authority, or based on error of law, or an abuse of discretion. (G. L. c. 15, § 1J.)

We summarize pertinent events in Boston beginning in October, 1965. The committee and the superintendent of schools then furnished the required statistics, which disclosed that twenty-five per cent of public elementary school students attended thirty-eight racially imbalanced schools. On the basis of the statistics the commissioner notified the committee that racial imbalance existed in certain schools. The committee filed with the board a plan to eliminate racial imbalance which the board deemed inadequate. At the committee's request the board pursuant to G. L. c. 15, § 1I, provided technical and other assistance, in the form of a "Task Force,"[1] to aid in the formulation and execution of plans to eliminate racial imbalance.

The committee first submitted a plan to eliminate imbalance to the board on December 22, 1965. This was rejected. A revised plan, submitted on June 13, 1966, was rejected on June 28, 1966, with a detailed analysis of the committee's plan and with the board's recommendations for compliance. On July 7, 1966, the committee resubmitted its original plan, and brought the present suit and the companion case, which were heard together in the Superior Court. See, *ante,* p. , fn. 1. On February 28, 1967, the committee submitted a new plan, which was accepted by the board on March 15.

The committee attacks the racial imbalance act as unconstitutional on its face in various respects.

1. We first consider whether the committee has standing to raise these questions. The defendants do not contend

[1] This consisted of members of the staff of the Department of Education, educators from Harvard and Boston University, and the chief of the psychiatric division of the United States Veterans Hospital.

otherwise but in their brief express the hope that the constitutional issues will be decided. Cases like *Assessors of Haverhill* v. *New England Tel. & Tel. Co.* 332 Mass. 357, 362, and *Quinn* v. *School Comm. of Plymouth,* 332 Mass. 410, 413, were not proceedings for declaratory relief under G. L. c. 231A. A recent case involving declaratory relief closely resembles the present case. In *School Comm. of New Bedford* v. *Commissioner of Educ.* 349 Mass. 410, 412, the school committee sought a declaration as to whether the commissioner could compel it to take a racial census in the public schools. The committee was held to have standing. There was no contention of unconstitutionality.

We are of opinion that in this declaratory proceeding involving questions of pressing public importance we should indicate our views where a vista of avoidable litigation among administrative officials is disclosed and the issues have been fully argued. This is a discretionary matter for the court.

2. The committee argues that because of vagueness the racial imbalance act violates the due process clause of the Fourteenth Amendment and arts. 1, 10, 11, and 30 of the Declaration of Rights.

The first objection on this ground is that no criteria are furnished to aid in classifying students as white and nonwhite. In spite of the committee's protestations this subject was settled for present purposes by *School Comm. of New Bedford* v. *Commissioner of Educ.,* 349 Mass. 410, 415-416, which upheld the census requirements of the commissioner. The plaintiff committee's argument really drafts for double duty its argument with respect to equal protection, a subject which will be more fully considered, *infra,* p. .

Another respect in which it is objected that the law is uncertain is the statement in c. 71, § 37D, that the term

"racial imbalance" refers to a ratio between nonwhite and other students in public schools which is sharply out of balance with the "racial composition of the society in which nonwhite children study, serve and work." This sentence is to be read with the one which immediately follows it. Both are quoted, *supra,* p. . The second sentence definitively declares that for the purpose of this section, racial imbalance shall be deemed to exist when the per cent of nonwhite students in a public school exceeds fifty per cent of the total. This is a proper occasion for application of the principle that a statute should be construed, wherever possible, to avoid doubts as to constitutionality. See *Worcester County Natl. Bank* v. *Commissioner of Banks,* 340 Mass. 695, 701, and cases cited.

3. Another alleged ground of unconstitutionality is that the act violates the equal protection clause of the Fourteenth Amendment and art. 1 of the Declaration of Rights. These provisions will be considered together as presented. See *Sheridan* v. *Gardner,* 347 Mass. 8, 15.

It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities,[1] should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment.

The statute has its foundation in a legislative finding that the Commonwealth is faced with an emergency because of racial imbalance in the public schools. This fact, fundamental to the issue before us, is not open to judicial reëxam-

[1] Section 37C provides: "It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites."

ination. *Russell* v. *Treasurer & Recr. Gen.* 331 Mass. 501, 507. *Massachusetts Commn. Against Discrimination* v. *Colangelo,* 344 Mass. 387, 393-394. The purpose is within the constitutional powers of a State Legislature. The heart of the matter is whether the means are reasonably related to the objective and hence are free of sound constitutional criticisms.

The committee seems bent on stifling the act before it has a fair chance to become fully operative. The objections it makes are numerous and expressed with slight deference. They are "bluntly" proclaimed as if the committee could by the force of its own word make the burden fall upon the "Commonwealth" to "establish a compelling justification" for the legislation. This tactic is diametrically at variance with long established rules. "All rational presumptions are made in favor of the validity of every legislative enactment. Enforcement is to be refused only when it is in manifest excess of legislative power. . . . It is only when a legislative finding cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it that a court is empowered to strike it down. . . . If the question is fairly debatable, courts cannot substitute their judgment for that of the Legislature." *Druzik* v. *Board of Health of Haverhill,* 324 Mass. 129, 138-139, and cases cited.

In resolving the issue of constitutionality it is no part of our function to assess the wisdom or to attempt to foretell the efficacy of the particular legislative plan. Some complaints are baleful predictions as to the effect of the act which are confidently asserted before precise results are known and before any individual or group has had the law unconstitutionally applied to them. We decline to follow the invitation to look ahead "twenty-five or fifty years from now" and by guesswork as of that time to discover "devastating implications." Still other objections are specula-

tive prophesies and little more than expressions born of the hope that the statute will fail. Most of these points may be summarily dismissed as immaterial to the real issues.

We give an example typical of unacceptable committee contentions. "The Commonwealth has the burden of convincing the Court that other approaches not utilizing racial classifications are neither feasible nor appropriate for the achievement of the legislative objective. For aught that appears, a reasonable solution may be obtained by improving the quality of the teachers and of the educational facilities in an imbalanced school and by the adoption of special enrichment programs therein."

We are not impressed with the proclaimed conclusion of the committee which "can perceive no overriding legislative justification for enacting a quota system for nonwhites," particularly when it is founded on its own self-serving judgment that the nonwhites will positively be excluded from particular schools because of color. Again we do not recognize the authority of the committee to veto the act because of its charges that "there is no overriding justification for enacting a law embodying a racial classification which will result in such an invidious discrimination," and that the "non-white quota restriction . . . [is] a subtle effort in part to cater to white prejudice and to deter an exodus of whites from the community by preventing too many Negroes from attending particular schools rather than . . . a truly objective effort to help the Negro."

We are of opinion that it would be unprofitable to discuss the cases which are cited by the committee. None is particularly in point. We shall, however, mention one. Great store is laid by a quotation from *McLaughlin* v. *Florida*, 379 U.S. 184, 194, which contains a statement in substance to the effect that racial group classifications "bear a far heavier burden of justification." The facts of that case

are extremely remote from any educational subject matter, but have to do with a discriminatory statute making interracial cohabitation a crime. The statute in the case at bar, on the other hand, "does not concern race except insofar as race correlates with proven deprivation of educational opportunity." *Springfield Sch. Comm.* v. *Barksdale,* 348 F. 2d 261, 266 (1st Cir.). See *Wanner* v. *County Sch. Bd. of Arlington County, Virginia,* 357 F. 2d 452, 454-456 (4th Cir.); *Morean* v. *Board of Educ. of Montclair,* 42 N. J. 237, 241-244.

Until a pupil has been in fact excluded from a public school on account of race, we are unimpressed with the argument that the act works a denial of equal protection. As appears from § 37D, the committee is not required to transport a pupil outside his neighborhood school district if his parent or guardian files a written objection.

4. The committee contends that the racial imbalance act violates the due process clause of the Fourteenth Amendment and arts. 1, 10, and 12 of the Declaration of Rights in failing to grant it a hearing on its proposed plans and the board's action thereon. This contention we reject. A sufficient reason is that the committee has no personal or property rights involved. *Assessors of Haverhill* v. *New England Tel. & Tel. Co.* 332 Mass. 357, 360. *Trenton* v. *New Jersey,* 262 U. S. 182, 185-192. The committee has no rights to a hearing under the State Administrative Procedure Act. By G. L. c. 30A, § 1 (1) (as amended through St. 1966, c. 14, §§ 42, 79, and c. 497), and § 10, the hearing is provided only when "required by constitutional right or by any provision of the General Laws." See *Westland Housing Corp.* v. *Commissioner of Ins.* Mass. , . No statute is suggested as being material, and there is no constitutional right. In *Milligan* v. *Board of Registration*

[a] Mass. Adv. Sh. (1967) 655, 660-661.

in Pharmacy, 348 Mass. 491, 494-500, individual property rights were involved. The applicants were precluded "from the pursuit of a lawful vocation at places where they deem[ed] it advantageous for them to work" (p. 499). See *Massachusetts Medical Serv.* v. *Commissioner of Ins.* 344 Mass. 335, 339.

The present point falls within what was said in *Opinion of the Justices,* 332 Mass. 785, 787, "The General Court is the source of the authority of school committees and can limit or extend their powers and lay down rules for the government of the public schools."

5. The interlocutory decree is affirmed. A final decree is to enter declaring that the racial imbalance act, St. 1965, c. 641, is not in violation of the Fourteenth Amendment of the Constitution of the United States or of arts. 1, 10, 11, 12, and 30 of the Declaration of Rights of the Constitution of the Commonwealth.

So ordered.

John W. White, Special Assistant Corporation Counsel (*Philander S. Ratzkoff & William A. Cotter, Jr.,* with him), for the plaintiff.

Elliot L. Richardson, Attorney General (*Howard M. Miller,* Assistant Attorney General, *Edward J. Barshak,* Special Assistant Attorney General, *& William G. Buss, Jr.,* with him), for the defendants.

Reuben Goodman, Steven Cohen, Herbert Hershfang & Lawrence D. Shubow, for American Jewish Congress & others, amici curiae, submitted a brief.

4. Statutory Appendix.

ACTS OF 1965, CHAPTER 641 (THE RACIAL IMBALANCE ACT).

AN ACT PROVIDING FOR THE ELIMINATION OF RACIAL IMBALANCE IN THE PUBLIC SCHOOLS.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to eliminate forthwith racial imbalance in the public schools, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be in enacted, etc., as follows:

SECTION 1. Chapter 71 of the General Laws is hereby amended by inserting after section 37B the following two sections:—

Section 37C. It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites.

Section 37D. The school committee of each city, town and district shall, annually, at such time and in such form as the commissioner shall determine, submit statistics sufficient to enable a determination to be made of the per cent of nonwhite pupils in all public schools and in each school under the jurisdiction of each such committee. Whenever the state board of education finds that racial imbalance exists in a public school it shall notify in writing the school committee or regional school district committee having jurisdiction over such school that such finding has been made. The school committee shall thereupon prepare a plan to eliminate such racial imbalance

and file a copy of such plan with the board. The term "racial imbalance" refers to a ratio between nonwhite and other students in public schools which is sharply out of balance with the racial composition of the society in which nonwhite children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of nonwhite students in any public school is in excess of fifty per cent of the total number of students in such school.

Said plan shall detail the changes in existing school attendance districts, the location of proposed school sites, the proposed additions to existing school buildings, and other methods for the elimination of racial imbalance. Said plan shall also include projections of the expected racial composition of all public schools. Any plan to detail changes in existing school attendance districts, the locations of proposed new school sites and proposed additions to existing school sites and proposed additions to existing school buildings with the intention of reducing or eliminating racial imbalance, must take into consideration on an equal basis with the above-mentioned intention, the safety of the children involved in travelling from home to school and school to home. Said plan may provide for voluntary co-operation by other cities and towns in rendering assistance and in making available facilities to effectuate said plan.

No school committee or regional school district committee shall be required as part of its plan to transport any pupil to any school outside its jurisdiction or to any school outside the school district established for his neighborhood, if the parent or guardian of such pupil files written objection thereto with such school committee.

Said board may, from time to time, require each school committee to submit to said board a report on the progress of the plan and its implementation.

The supreme judicial and the superior court shall have jurisdiction in equity upon petition of the board of education to enforce the provisions of this section.

SECTION 2. Chapter 15 of the General Laws is hereby amended by inserting after section 1H the following three sections:—

Section 1I. The board of education shall provide technical and other assistance in the formulation and execution of plans to eliminate racial imbalance, made pursuant to section thirty-seven D of chapter seventy-one. Whenever the board determines that a school committee or regional school district committee has failed to file a plan in compliance with the provisions of said section, it shall consult with and make specific recommendations for a plan by such school committee or regional school district committee.

If, following the receipt of notification from the board of education that racial imbalance, as defined in section thirty-seven D of chapter seventy-one, exists, a school committee or regional school district committee does not show progress within a reasonable time in eliminating racial imbalance in its schools the commissioner of education shall not certify the amount of state aid for such city or town or for such towns which are members of such regional school districts, as required by section nine of chapter seventy, and the school building assistance commission upon receipt of notice from said board that racial imbalance exists shall not approve any project for school construction for such city, town or regional school district under chapter six hundred and forty-five of the acts of nineteen hundred and forty-eight, as amended, and the commissioner of education may notify the commissioner of corporations and taxation and the comptroller to hold such funds as have been so certified under said section nine but have not

been disbursed. The commissioner of education may thereafter upon receipt of a plan acceptable to the board of education notify the commissioner of corporations and taxation and the comptroller to pay any such withheld funds to such city or town in such amounts and at such times as he may designate, and the school building assistance commission upon receipt of notice from said board that a plan acceptable to it has been received may approve such projects.

The school building assistance commission shall, notwithstanding any contrary provision of chapter six hundred and forty-five of the acts of nineteen hundred and forty-eight, as amended, increase the amount of grants for schoolhouse construction to sixty-five per cent of the approved cost, whenever the board of education is satisfied that the construction or enlargement of a schoolhouse is for the purpose of reducing or eliminating racial imbalance in the school system and so notifies the school building assistance commission.

Section 1J. Within thirty days after (1) a school committee or regional school district committee declines to accept the recommendations submitted to it by the board or (2) the board disapproves a revised plan submitted to it by a school committee or regional school district committee, said committee may file a petition for judicial review in the superior court for the county in which it is located or in the supreme judicial court for Suffolk county. The court may affirm the board's determination of the recommendations submitted by it or its determination of disapproval of a revised plan submitted to it, and order compliance with the recommendations of the board by appropriate decree, or if it finds and rules that the determination by the board is (*a*) in excess of the statutory authority or jurisdiction of the board, or (*b*) based upon an error of law, or (*c*)

arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, then it may set aside such determination by the board and remand the matter to it for further action.

The supreme judicial and the superior court shall have jurisdiction in equity upon petition of the board of education to order funds withheld as provided in section one I for such period of time as the court may determine.

Section 1K. The board of education, with the advice of the commissioner, shall appoint an advisory committee on racial imbalance and no individual shall be appointed to this advisory committee on racial imbalance who has been listed in any state or federal document as being a member of a communist front organization. The members of the committee shall serve without compensation except that they may be reimbursed for the necessary expenses actually incurred in the performance of their duties.

Approved August 18, 1965.

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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 759.

SCHOOL COMMITTEE OF THE CITY OF BOSTON,
Appellant,

v.

BOARD OF EDUCATION ET AL.,
Appellees.

MOTION TO DISMISS.

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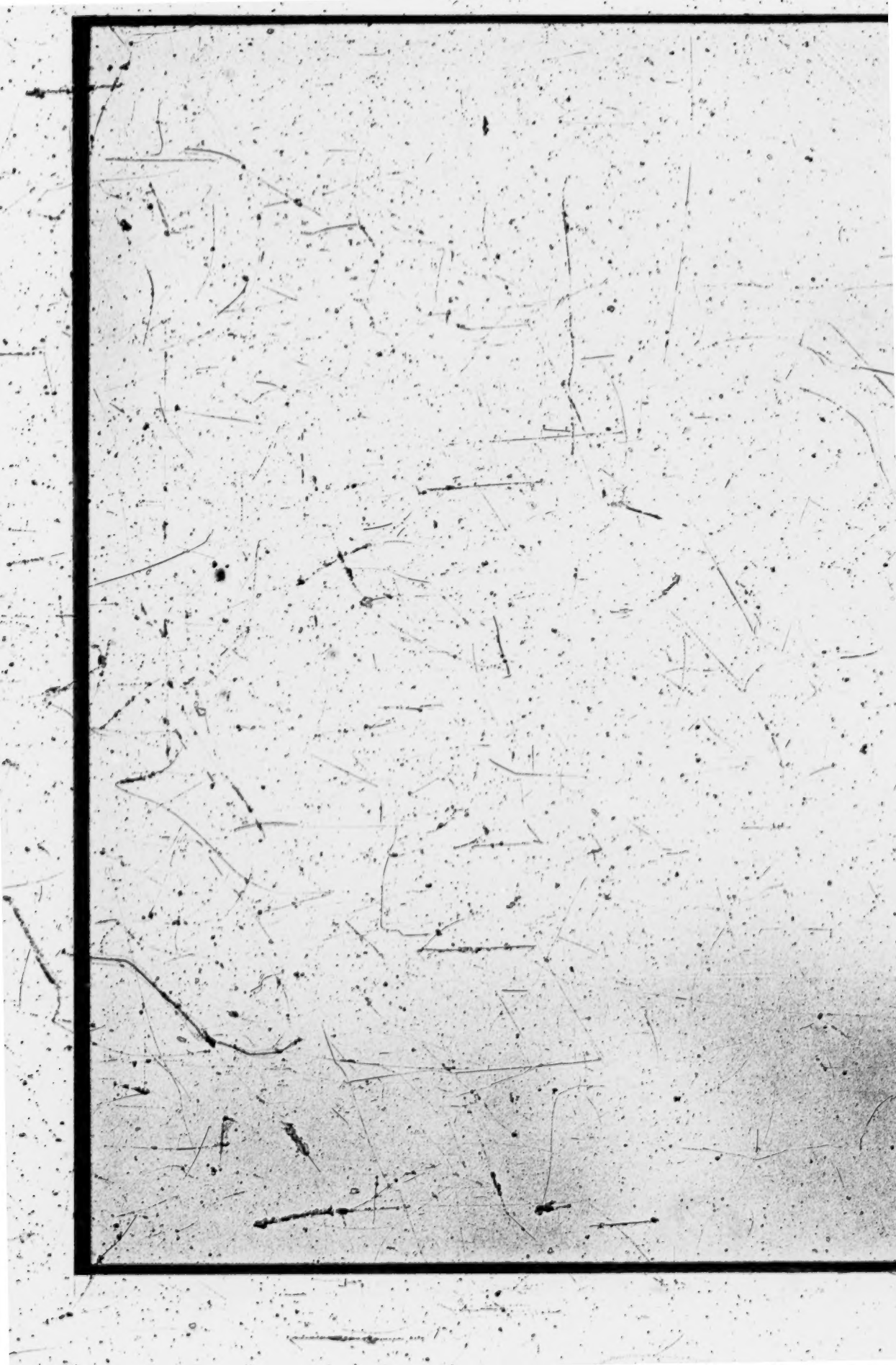


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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 759.

SCHOOL COMMITTEE OF THE CITY OF BOSTON,
Appellant,
v.
BOARD OF EDUCATION ET AL.,
Appellees.

MOTION TO DISMISS.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, hereby move that the appeal of appellant be dismissed for the reasons hereinafter set forth.

Statement of Case.

This is an appeal from an order of the Massachusetts Supreme Judicial Court declaring that the Massachusetts Racial Imbalance Statute, St. 1965, c. 641, is not in violation of the Fourteenth Amendment of the Constitution of the United States. The opinion of the Massachusetts Supreme Judicial Court and the Racial Imbalance Statute are reprinted in the Appellant's Jurisdictional Statement (herein cited as "Jur. St.").

The litigation was commenced by a petition for declaratory judgment, brought by the appellant (School Committee of the City of Boston) against the members of the Massachusetts State Board of Education and the Massachusetts Commissioner of Education in the Massachusetts Superior Court for Suffolk County (R. I, 13). The Superior Court reserved and reported the case without decision to the Massachusetts Supreme Judicial Court upon the pleadings, evidence and findings of fact, such decree to be entered as justice and equity may require (R. I, 1, 12-21).

The Racial Imbalance Statute may be summarized as follows: It provides that the School Committee of each city, town and district shall annually conduct a "racial census," and submit to the State Board of Education statistics "sufficient to enable a determination to be made of the per cent of nonwhite pupils in all public schools and in each school under the jurisdiction of each such committee" (G.L. c. 71, § 37D, as inserted by St. 1965, c. 641, § 1). If the State Board finds that racial imbalance exists in one or more of the public schools in a municipality or a district, it shall notify the appropriate School Committee that such a finding has been made. Racial imbalance is defined in terms of a comparison between the nonwhite students in a school with their ratio in the general community. This definition is to be read with the next sentence, which provides that a school is racially imbalanced when there are more than 50 per cent nonwhite in the student body.[1]

[1] In rejecting appellant's contention, not now in issue, that the term "racial imbalance" was uncertain in definition, the Massachusetts Supreme Judicial Court held that the 50 per cent definition would be given effect and that it was "a proper occasion for application of the principle that a statute should be construed, wherever possible, to avoid doubts as to constitutionality" (Jur. St. 23).

Argument.

I. Most of the Questions Raised Depend on Facts Not Proved by Appellant and Contrary to the Findings of the Massachusetts Supreme Judicial Court.

The appellant has failed to prove any infringement of any particular person's rights in violation of the Fourteenth Amendment. Certainly the constitutional rights of the individual members of the Boston School Committee have not been infringed. It was only allowed to raise the constitutional issues by the Massachusetts Supreme Judicial Court because the Court, in the exercise of its discretion, was of the opinion ". . . that in this declaratory proceeding involving questions of pressing public importance we should indicate our views where a vista of avoidable litigation among administrative officials is disclosed and the issues have been fully argued" (Jur. St. 22).

Indeed the Massachusetts Supreme Judicial Court expressly found:

> "Until a pupil has been in fact excluded from a public school on account of race, we are unimpressed with the argument that the act works a denial of equal protection." (Jur. St. 26.)

The superficially serious questions raised on which there might be a difference of legal opinion as to result are based on prophesies and speculation rather than on the findings of the Massachusetts Court. Included in these contentions are that the Racial Imbalance Statute establishes an exclusionary color quota which may require exclusion of a child simply because of his color, and that ultimate compliance with the statute can be accomplished only by an exchange of students between balanced and imbalanced schools, requir-

ing different treatment of students similarly situated solely because of their color.

The opinion of the Massachusetts Supreme Judicial Court appropriately characterizes and disposes of these contentions by the following statement:

> "Some complaints are baleful predictions as to the effect of the act which are confidently asserted before precise results are known and before any individual or group has had the law unconstitutionally applied to them. We decline to follow the invitation to look ahead 'twenty-five or fifty years from now' and by guesswork as of that time to discover 'devastating implications.' Still other objections are speculative prophesies and little more than expressions born of the hope that the statute will fail." (Jur. St. 24-25.)

Judicial determination of these questions must necessarily rest on a factual basis which is not present in this case. It would seem far better for this Court not to consider such serious allegations on the basis of prognostications.

II. Even if the Standard of "Nonwhite" is Too Vague a Standard for Application by Administrative Officials, No Federal Question is Raised.

Pursuant to the Racial Imbalance Statute the determination that racial imbalance exists is to be made by the State Board of Education (G.L. c. 71, § 37D; Jur. St. 28). The basis for making the determination necessitates counting "nonwhite" students. There is precedent for the Massachusetts court's conclusion that this standard is reasonably capable of application by administrative officials. *School Committee of New Bedford* v. *Commissioner of Education*, 349 Mass. 410, 415-416; see *United States* v. *Thind*, 261 U.S.

204, 206-215. However, it is not necessary for purposes of this motion to consider the correctness of the decision, because, even if the standard is vague, it raises no federal question.

The alleged vague standard in this case does not create a situation where individuals may unwittingly subject themselves to criminal or civil liability because they are unable to discover from the terms of the statute whether or not particular conduct is forbidden. It raises at most the question whether the standard is of sufficient clarity so that the State Board of Education may appropriately work out the details and implementation of the legislation, avoiding a successful challenge *under state law* that the Massachusetts Legislature has improperly delegated its legislative power to the State Board of Education. (See, *e.g., Opinion of the Justices,* 334 Mass. 721, 743, and case cited therein.)

Whether the Massachusetts Legislature has properly delegated its authority is plainly a question to be answered with reference to Massachusetts state law. Appellees know of no authority that the Due Process Clause of the Fourteenth Amendment requires that a state legislature clearly delineate its delegation of authority to public officials charged with administering a particular law. This court should therefore decline to exercise jurisdiction with respect to this question, as it raises no federal question.

III. The Massachusetts Supreme Judicial Court did Not Expressly Pass on the Question of Whether the Racial Imbalance Statute is Unequal in its Application to Underprivileged Persons, nor does This Raise a Substantial Federal Question.

Appellant contends that the act is discriminatory, in violation of the equal protection clause of the Fourteenth

Amendment, because it is unreasonably preferential and unequal in its application to the underprivileged groups in our society whose educational patterns are as abnormal as those of nonwhites. The opinion of the Massachusetts Court does not indicate that this question was expressly passed on. Therefore this question cannot properly be brought before this court.

Moreover, no substantial federal question is raised, since this is simply an attempt to attack the wisdom of the statute. "In resolving the issue of constitutionality it is [not part of the court's function] to assess the wisdom . . . of the particular legislative plan" (Jur. St. 24). A legislature dealing with social evils may recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. The Legislature may proceed cautiously and, "if the evil is specially experienced in a particular branch of business," it is not necessary that the prohibition "should be couched in all-embracing terms." *Carroll* v. *Greenwich Insurance Co.*, 199 U.S. 401, 411. Simply because there are other instances to which the law might apply is no reason to raise constitutional doubt as to its validity. *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U.S. 224, 227. *Miller* v. *Wilson*, 236 U.S. 373, 384. Therefore, even if the question is properly before this court, it raises no substantial federal question.

IV. Recognition of Race to Create Equal Educational Opportunities is Manifestly Constitutionally Permissive.

The holding of the Massachusetts court that recognition of race for educational purposes is permitted is so manifestly correct that no substantial federal question is raised. The precise issue before the Massachusetts Supreme Ju-

dicial Court was not whether the Fourteenth Amendment requires state authorities, including the state Legislature, to take action aimed at correcting racial imbalance in its schools, but whether the Fourteenth Amendment permits such authorities to take such action.

With the exception of the Illinois Supreme Court (*Tometz* v. *Board of Education, Waukegan City School District,* —N.E. 2d—(unreported because petition for rehearing allowed, Jur. St. 9), no court that has considered this question has had any difficulty in concluding that it is within the power of a state to take such corrective action. These cases are collected in 11 A.L.R. 3d 782, and Racial Isolation in Public School, U.S. Government Printing Office (1967), pp. 234-236.

The permissible basis for such corrective action is probably best expressed by the court in the case of *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1st Cir. 1965), where the court said at page 266:

> "It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race except insofar as race correlates with proven deprivation of educational opportunity. . . . It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them."

Recognition of race necessarily depends on the purpose of the legislation. In this case that purpose is equal edu-

cational opportunity designed to bring Negroes into the mainstream of American life in furtherance of the principles of the Equal Protection Clause of the Fourteenth Amendment. Appellant's reliance on the case of *McLaughlin* v. *Florida*, 379 U.S. 184, 194, is unwarranted. That case suggests that a state must prove an overriding statutory purpose requiring racial classification rather than merely showing that classification is rationally related to the accomplishment of a permissible state policy. One might reasonably question whether that principle merely establishes a rule of evidence rather than a federal constitutional standard, but under any circumstances that case does not raise any doubts as to the validity of the Massachusetts Supreme Judicial Court decision.

The facts of *McLaughlin*, dealing with a discriminatory statute making interracial cohabitation a crime, are of course extremely remote from any educational subject matter. But a more important distinction is that in *McLaughlin* the state statute was enacted and applied with the purpose of discriminating against Negroes. The purpose of the racial imbalance statute is to aid Negroes in achieving equal educational opportunities. Appropriately Mr. Justice Frankfurter, in the case of *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98, stated: "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." With even stronger language the Massachusetts Court in this case stated:

> "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment." (Jur. St. 23.)

Lastly, even if *McLaughlin* establishes a constitutional standard and even if that standard is applicable to the facts of this case, the burden of the Commonwealth of Massachusetts would be met because the Racial Imbalance Statute concerns race only "insofar as race correlates with *proven* deprivation of educational opportunity." *Springfield School Committee* v. *Barksdale, supra,* 266. (Emphasis supplied.)

Whether it is permissible for the Massachusetts Legislature to recognize race in enacting the Racial Imbalance Statute is the only question of public importance raised by the appellant that is not based on facts or speculation. The only authority answering this question in the negative is the Supreme Court of Illinois in a decision presently being reconsidered. That decision would command government to sit and watch Negroes flounder in a quagmire of oppressive unequal educational opportunity. It is beyond reason that the Fourteenth Amendment of the Constitution would require such a result. It is therefore submitted on the basis of persuasive precedent that appellant's appeal should be dismissed for failure to raise a substantial federal question.

Conclusion.

For the foregoing reasons it is respectfully submitted that the appeal of appellant be dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

SCHOOL COMMITTEE OF CITY OF BOSTON *v.* BOARD OF EDUCATION ET AL.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 759. Decided January 15, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.